United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

NO. 77-7111

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

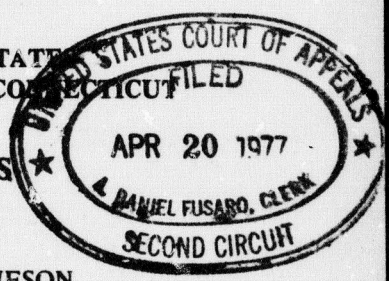
B

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO,
Plaintiff-Appellees,
v.

WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ,
Defendants,

WESTERN CONNECTICUT BROADCASTING COMPANY AND KINGSLEY GILLESPIE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT



BRIEF FOR APPELLANTS

PAUL C. JAMIESON
500 Summer Street
Stamford, Connecticut 06901

and

THOMAS H. WALL
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Western Connecticut Broadcasting Company and Kingsley Gillespie

Of Counsel:
Alan C. Campbell
Richard D. Marks
John R. Feore, Jr.
DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

THE CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

Cases ii

Statutes v

Federal Communications Commission Decisions and Orders vi

Federal Communications Commission Regulations vii

Other Authorities viii

STATEMENT OF ISSUES 1

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 2

ARGUMENT 9

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE ACTIONS OF THE RADIO STATION AND ITS EMPLOYEES CONSTITUTED STATE ACTION 9

A. INTRODUCTION 9

B. THE DISTRICT COURT FAILED TO CONSIDER THE RADIO STATION'S FIRST AMENDMENT RIGHTS IN RESOLVING THE STATE ACTION QUESTION 14

C. THE DISTRICT COURT ERRED IN BASING ITS STATE ACTION HOLDING ON THE FEDERAL COMMUNICATIONS COMMISSION's FREQUENCY ALLOCATIONS 24

Page

D. THE DISTRICT COURT ERRED IN BASING ITS STATE ACTION HOLDING ON THE FEDERAL COMMUNICATIONS COMMISSION's REGULATION OF THE RADIO STATION 32

II. EVEN ASSUMING STATE ACTION, THE DISTRICT COURT ERRED IN HOLDING THAT THE ACTIONS OF THE RADIO STATION AND ITS EMPLOYEES CONSTITUTED A VIOLATION OF THE FIRST AMENDMENT 42

III. CONCLUSION 48

TABLE OF AUTHORITIES

Cases:

Accuracy in Media v. FCC, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) 43

Ackerman v. Columbia Broadcasting System, Inc., 301 F. Supp. 628 (S.D.N.Y. 1969) 23

Avins v. Rutgers, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) 28, 47

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 42

Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 47

Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) 30

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 10, 40

Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971) 18, 27

Page

Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 97 S. Ct. 247 (1976) 44

Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) ..... *passim*

Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83 (7th Cir. 1962) 23, 44

Evans v. Newton, 382 U.S. 296 (1966) 39

FCC v. Sanders Brothers Radio Station, 308 U.S. 470 (1945) 40

Gitlow v. New York, 268 U.S. 652 (1925) 9

Gordon v. National Broadcasting Co., 287 F. Supp. 452 (S.D.N.Y. 1968) 23, 44

Holodnak v. Avco Corp., 514 F.2d 283 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) 41

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) 37, 38

Hudgens v. NLRB, 424 U.S. 507 (1976) 9, 13, 14, 40

Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) 34

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) ..... *passim*

Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974) 11

Kuczo v. Western Connecticut Broadcasting Co., 424 F. Supp. 1325 (D. Conn. 1976) 2

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) 13, 14, 40

Mark v. FCC, 468 F.2d 266 (1st Cir. 1972) 42

Page

Marsh v. Alabama, 326 U.S. 501 (1946) 4, 38, 40

Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950) 28

McCarthy v. FCC, No. 76-915 (D.C. Cir., Oct. 22, 1976) 42, 44

McGlotten v. Connally, 338 F. Supp. 448 (D. D.C. 1972) 9

McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3rd Cir. 145), *cert. denied*, 327 U.S. 779 (1946) 27, 28, 36

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 40, 45

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 26, 27, 34

Moro v. Telemundo, Inc., 387 F. Supp. 920 (D. P.R. 1974) 29

National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975) 47

New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) 36

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 46

New York Times Co. v. United States, 403 U.S. 713 (1971) 42

Pacifica Foundation v. FCC, No. 75-1391 (D.C. Cir., Mar. 16, 1977) 13, 17

Post v. Payton, 323 F. Supp. 799 (E.D. N.Y. 1971) 28, 29, 39

Page

Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) 35, 39

Public Utlities Comm'n v. Pollak,
343 U.S. 451 (1952) 9, 19, 26, 27, 34, 35

Red Lion Boardcasting Co. v. FCC,
395 U.S. 367 (1969) 20, 21, 22, 24, 46

Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942) 23

Shelley v. Kraemer, 334 U.S. 1 (1948) 11

Smith v. Allwright, 321 U.S. 649 (1944 38

Smothers v. Columbia Broadcasting System, Inc.,
351 F. Supp. 622 (C.D. Cal. 1972) 29

Straus Communications, Inc. v. FCC, 530 F.2d
1001 (D.C. Cir. 1976) 17

Terry v. Adams 345 U.S. 461 (1953) 40

United States v. Paramount Pictures, Inc.,
334 U.S. 131 (1948) 13

Wahba v. New York University, 492 F.2d 96
(2d Cir.), *cert. denied*, 419 U.S. 874 (1974) 10, 11

Weise v. Syracuse University, 522 F.2d 397
(2d Cir. 1975) 36

Writers Guild v. FCC, 423 F. Supp. 1064 (C.D.
Cal. 1976) 23, 30, 42

Statutes:

Civil Rights Act of 1871, 42 U.S.C. §1983 (1970) 3

Civil Rights Act of 1871, 42 U.S.C. §1985 (1970) 2, 3

Page

Communications Act of 1934, as amended, 47 U.S.C. §3(h) (1970) 15

Communications Act of 1934, as amended, 47 U.S.C. §201(a) (1970) 15

Communications Act of 1934, as amended, 47 U.S.C. §202(a) 15

Communications Act of 1934, as amended, 47 U.S.C. §307(a) 15

Communications Act of 1934, as amended, 47 U.S.C. §309(a) 15

Communications Act of 1934, as amended, 47 U.S.C. §310(b) 15

Communications Act of 1934, as amended, 47 U.S.C. §312 ..... 6, 46

Communications Act of 1934, as amended, 47 U.S.C. §315 ..... *passim*

Communications Act of 1934, as amended, 47 U.S.C. §326 ..... 16, 22, 40

Radio Act of 1927, 44 Stat. 1162 (1927) 12

Federal Communications Commission Decisions and Orders:

Aspen Institute, 55 F.C.C.2d 697 (1975) 44

Democratic National Convention Television Coverage, 16 F.C.C.2d 650 (1969) 17

En Banc Programming Inquiry, 40 F.C.C. 2303 (1960) 16

Page

National Ass n of Theater Owners of Indiana, 24 F.C.C.2d 483 (1970) 17

Stephen R. Rintoul, 11 F.C.C. 108 (1945) 4

The LBJ Co., 38 P&F Radio Reg.2d 543 (1976) 6

Use of Broadcast Facilities by Candidates For Public Office, 24 F.C.C.2d 832 (1970) 44

Washington Star Communications, Inc., 57 F.C.C.2d 475 (1976) 17

Western Connecticut Broadcasting Co., 43 F.C.C.2d 730 (1973) 6, 8

Western Connecticut Broadcasting Co., 43 F.C.C.2d 752 (1972) 6, 7, 8

Federal Communications Commission Regulations:

47 C.F.R. §73.123 (1976) 21, 46

47 C.F.R. §73.300 (1976) 21, 46

47 C.F.R. §73.598 (1976) 21, 46

47 C.F.R. §73.679 (1976) 21, 46

Other Authorities:

S. Rep. No. 772, 69th Cong., 1st Sess. (1927) 15

S. Rep. No. 1567, 80th Cong., 2d Sess. (1948) 16

Broadcasting Yearbook 1977 31

Broadcasting Yearbook 1976 28

Pub. L. No. 86-677, 86th Cong., 2d Sess. (1960) 43

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-7111

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO,
Plaintiff-Appellees.

v.

WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ,
Defendants.

WESTERN CONNECTICUT BROADCASTING COMPANY AND KINGSLEY GILLESPIE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES

1. Did the actions of radio station WSTC and its employees in editing on-the-air appearances by two political candidates constitute federal action subject to the first amendment?

2. Did the actions of radio station WSTC and its employees in editing on-the-air appearances by two political candidates violate the first amendment?

PRELIMINARY STATEMENT

The decision below was rendered by Circuit Judge J. Edward Lumbard, sitting by designation in the District Court for the District of Connecticut. It is reported as *Kuczo v. Western Connecticut Broadcasting Co.*, 424 F. Supp. 1325 (D. Conn. 1976).

STATEMENT OF THE CASE

On January 17, 1977, Judge Lumbard authorized an immediate interlocutory appeal in this case pursuant to 28 U.S.C. §1292(b). He certified as a controlling question of law whether the actions of a broadcast station and its employees constitute "federal action subject to the first amendment" (J.A. 183). This court granted defendants' petition for leave to appeal on February 24, 1977.

Plaintiffs were the unsuccessful candidates for mayor of Stamford, Conencticut in the 1969 general election. On October 20, 1972, they filed a complaint in the district court for damages charging violations of the first and fourteenth amendments of the United States Constitution and of the Civil Rights Act of 1871[1] (J.A. 6-8).

The defendants are Western Connecticut Broadcasting Company ("Western"), a corporation licensed by the Federal Communications Commission ("FCC" or "Commission") to operate radio stations WSTC and WYRS(FM) (formerly WSTC-FM) in Stamford, its President-Treasurer, Kingsley Gillespie ("Gillespie"), and its former Secretary-General Manager, Julian Schwartz ("Schwartz").

The complaint charged that the defendants conspired together: (1) to censor material plaintiffs sought to broadcast on radio station WSTC; (2) to deny plaintiffs the opportunity to respond or reply to allegations made by other competing candidates; and, (3) to discriminate against

---

[1] 17 Stat. 13, 42 U.S.C. §1985 (1970).

plaintiffs in the time location of their programs and in the use of languages other than English in their programs.

Defendants Western and Gillespie answered the complaint on March 28, 1973, generally denying plaintiffs' allegations, denying the court's subject matter jurisdiction, denying the existence of a cause of action upon which relief could be granted and raising the affirmative defense of a statute of limitations bar (J.A. 11).

On September 23, 1976, defendants Western and Gillespie moved for summary judgment on the ground that the necessary governmental action to support a claim under the first or fourteenth amendments was lacking and on the ground that plaintiffs had failed to state a cause of action for which relief could be granted under the Civil Rights Act (J.A. 13, 18-54).[2] Plaintiffs filed a brief opposition contending that the case involved questions of fact not of law and, therefore, could not be resolved on a summary judgment motion (J.A. 158-60).

The lower court agreed that the plaintiffs had no cause of action under the Civil Rights Act because there had been no action "under color of state law" and because there was no conspiracy based on any "discriminatory animus" (J.A. 172). While finding that there was no basis for a claim under the fourteenth amendment (J.A. 172), the judge concluded that:

> the actions by the radio station and its employees did constitute federal action subject to the first amendment under the circumstances of this case.

In reaching this conclusion, the court stated initially that in order to find state action, there must exist a "sufficiently close nexus between the state and the challenged action in order to subject that action to constitutional constraints." In this regard, the court found that governmental

[2]Defendant Schwartz subsequently joined in the motion for summary judgment (J.A. 154-57) but is not a party to this appeal.

regulation gave WSTC and WYRS "monopoly control over the local airways."

The court reasoned that since the station was the primary carrier of information in the community, "federal regulation has invested Western [the licensee] with the capacity to obstruct free speech in local elections" (J.A. 170).

Since the licensee was given the opportunity by the government to engage in effective "censorship", the court held that the action of the broadcaster was the equivalent of state action, citing the Supreme Court's decision in *Marsh v. Alabama*, 326 U.S. 501 (1946). The court found that state action was present even though the editing of the political advertisements was specifically prohibited by Section 315(a) of the Communications Act, and even though the Commission had specifically held that Western had violated the law.

The court indicated, however, that its decision did not necessarily suggest that all broadcaster action would be held state action. Without elaboration, the court stated that:

> [O]ligopoly rather than monopoly radio stations, programming of a different character or addressed to different audiences, and situations where the free speech rights of the broadcaster are also involved may present more subtle issues than those obtaining in the present case (J.A. 174).

Having determined that the action of Western was state action, the court without further analysis assumed that the first amendment had been violated, since the court erroneously found that the defendants had conceded that the editing in question would be a violation of the first amendment if performed by the government.

Western has been a Commission licensee since 1946, acquiring WSTC from the former owner in 1945[3] and con-

[3]After a hearing, the Commission approved the sale of WSTC to Western. Stephen R. Rintoul, 11 F.C.C. 108 (1945).

structing WYRS pursuant to Commission authority the following year. As general manager of the stations, Schwartz exercised supervision over programs, policies and personnel, although he consulted Gillespie on these matters. Mr. Gillespie made final policy decisions (J.A. 57).

The 1969 Stamford mayoralty general election involved three candidates: Paul Kuczo, Jr. (Democrat), John J.P. Nocerino (Fusion Party), and Julius Wilensky (Republican). The general election took place on November 4 and was won by Julius Wilensky, who received 19,816 votes to Kuczo's 15,415 and Nocerino's 723 (J.A. 57).

During the campaign all three mayoral candidates utilized the facilities of WSTC for the purchase of "spot announcements" and programs.[4] As a result of Western's editorial policies which included the review of the plaintiffs' scripts by Schwartz and the deletion of certain material from a limited number of them, the Commission conducted an investigation into charges that Section 315 had been violated.[5]

---

[4]Mr. Kuczo and/or his supporters purchased about 600 commercial announcements on WSTC between September 13 and November 4, 1969. For the most part, these were 60-second or 10-second spot announcements which did not include Mr. Kuczo's voice. Various individuals also purchased 5-minute political programs supporting his candidacy. Mr. Nocerino purchased a series of 5-minute weekly programs on WSTC which ran from September 8 through November 3. He personally appeared on these programs (J.A. 58-59).

[5]Secton 315 of the Communications Act, as amended, provides in part that:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate . . . .

47 U.S.C. §315 (1970).

(continued)

The FCC investigation was initiated by a complaint from Mr. Nocerino made subsequent to the November 4, 1969 election. On October 8, 1970, the Commission directed Western to show cause why its licenses for the stations should not be revoked pursuant to its authority under the Communications Act, 47 U.S.C. §312. 35 Fed. Reg. 16810 (1970).

Hearings were conducted in October and December of 1971 by the FCC (Mr. Kuczo testified on October 20, 1971 and Mr. Nocerino testified on October 20 and 21, 1971).[6] An Initital Decision of the FCC Hearing Examiner was released on August 2, 1972. Western was fined $10,000.00 by the Hearing Examiner for illegal censorship of political broadcasts and failure to provide equal opportunities to political candidates, contrary to the requirements of the Communications Act. The FCC affirmed this Initital Decision in 1973, agreeing with the Hearing Examiner that Western had violated the censorship and equal opportunities provisions of Section 315.[7]

The FCC found that the review and alteration of the scripts of Nocerino and Kuczo was a violation of Section 315. However, the FCC also found that Schwartz's actions were not politically motivated and that his reasons for not reviewing the Republican candidate's scripts were consistent with his efforts to maintain the station's image.[8] The

---

[5](continued)
The term "use" is a word of art referring only to broadcast material in which a legally qualified candidate appears in person either visually or orally. *See* The LBJ Co., 38 P & F Radio Reg.2d 543 (1976).

[6]The FCC hearing involved other issues not relevant to this case.

[7]The Initial Decision of the Hearing Examiner, 43 F.C.C.2d 752 (1972), is reproduced at J.A. 65-127. The decision of the Commission, 43 F.C.C.2d 730 (1973), is reproduced at J.A. 132-53.

[8]Schwartz explained that he did not review Mr. Wilensky's scripts because he felt from other utterances of the candidate that his scripts
(continued)

Commission accepted the Hearing Examiner's conclusions regarding the motives of Schwartz. As the Examiner noted:

> In its Order denying reconsideration (30 F.C.C.2d 303, 304-05), the Commission indicated that inquiry would be appropriate into Schwartz's motives in his treatment of Kuczo and Nocerino. Principally, it desired clarification of incidents which led the Bureau to conclude that Schwartz's actions might have been part of a comprehensive scheme to favor one candidate over another. The Bureau, however, absolutely failed to establish the existence of any such scheme.
>
> On the contrary, the reasonable conclusion to be drawn from the evidence is that Schwartz's motives in censoring were those he stated to the candidates and to the Commission. He simply wanted to ensure that all material broadcast over the stations conformed to his standards of good taste. The lack of intention to favor a particular candidate is evidenced by the fact that Schwartz objected to references in the Nocerino scripts which were uncomplimentary to both of the other candidates. He also took a Wilensky announcement attacking Kuczo off the air immediately after he learned of it. These actions are inconsistent with a view of Schwartz as a man with a fixed purpose to favor the Republican candidate. They are perfectly consistent, however, with a view of him as a man who was imbued with the desire to preserve good taste on his stations.

43 F.C.C.2d at 806 (J.A. 119).

---

[8](continued)
would not offend "good taste"; because an employee of the station independently and on his own time was assisting Mr. Wilensky, and Mr. Schwartz knew that the employee understood the staton's standards; and because the scripts for Mr. Wilensky were prepared professionally with the assistance of another man whom Schwartz knew personally and in whom he had complete confidence. 43 F.C.C.2d at 735 (J.A. 137).

The FCC concluded that the editing by Schwartz was done in order to preserve the "image" of the stations, which were described as his "shadows" and which he had endeavored for almost 25 years to build into respected community voices. The FCC found that the standard which Schwartz used in determining whether deletions were necessary was that of "good taste." In Schwartz's judgment, material was not in good taste if it involved name-calling, a person's reputation or an exaggeration,[9] or seemed otherwise objectionable. 43 F.C.C.2d at 731-32 (J.A. 133-34).

The Commission did not revoke Western's licenses for WSTC and WYRS at the conclusion of the hearing although, as stated, imposing a $10,000.00 fine. Western is still licensee of these stations.[10]

[9]For example, two portions in Mr. Nocerino's November 3 script were deleted—the statement that Kuczo had "spent an estimated $70,000.00 to try and change his image" and the rhetorical question concerning Kuczo "How can anyone be in public life so long and accomplish so little". The reference to $70,000.00 was deleted as an exaggeration since Schwartz knew Kuczo had not spent that much. The comment on Kuczo's public accomplishments was considered not to be in good taste. 43 F.C.C.2d at 762-63. (J.A. 75-76).

[10]Western is involved in a comparative hearing with a competing applicant for the WSTC license. In an Initial Decision issued January 14, 1977 (FCC 77D-3) an FCC Administrative Law Judge recommended grant of the competing application. That decision has been appealed to the Commission.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE ACTIONS OF THE RADIO STATION AND ITS EMPLOYEES CONSTITUTED STATE ACTION.

A. Introduction

The importance of the lower court's holding that the actions of Julian Schwartz "constitute[d] federal action" is obvious. Absent a finding of "state action,"[11] Schwartz, as a private employee acting in the course of his employment with a private corporation, would not be subject to the constitutional restraints of the Bill of Rights. Nor would his actions subject his employer Western to the restraints properly imposed only on the actions of the government.

The first amendment's proscriptions are restrictions on governmental action and do not impose restraints on the conduct of private parties. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). As the Supreme Court has noted, "the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). Were the Federal government or a state government[12] to infringe the free speech rights of Kuczo and Nocerino it would raise a first amendment question. However, individuals and a corporation rather than the federal government have been sued by these candidates. Thus, the initial

---

[11]While the governmental action necessary to invoke the proscriptions of the first amendment is sometimes distinguished from the necessary state action for fourteenth amendment purposes, the phrase "state action" is often generally referred to as the necessary prerequisite for implementation of any constitutional constraints on private conduct. *See* McGlotten v. Connally, 338 F. Supp. 448, 455 n.31 (D.D.C. 1972). Thus, the terms state action and governmental or federal action will be employed interchangeably in this brief.

[12]*See* Gitlow v. New York, 268 U.S. 652 (1925).

inquiry must focus on whether the constitutionally proscribed line between the individual and the state is to be breached in this instance with the result that private action of a press is restricted by the Constitution. No matter how wrongful or unjustified the conduct, absent a finding of state action there can be no violation of the Constitution. As will be indicated below, the undisputed facts in this case do not support such a finding and thus the lower court's holding in this regard is clearly erroneous. We submit that the lower court's finding is based on a totally inadequate sifting of facts and an incomplete analysis of the constitutionally prescribed separation of public and private action.

The search for state action is often a difficult and uneven task. On the one hand, the demarcation of the spheres public and private is a dynamic process and the boundaries between the two shift and are obscured by the individual factual situations. As a result, no mechanical test has yet replaced the Supreme Court's admonition in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), that "only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." On the other hand, the courts have recognized that constitutional restraints were purposefully imposed only on government. Wary of a too powerful and dominating government and concerned for the values of individual automony, the prerogatives of private property and society's changing circumstances, the framers and amenders of the Constitution deigned not to unduly restrict private actions. As a result applying constitutional standards to private actions, i.e. finding state action, normally entails an important balancing process. This court has recognized that the delicate state action equation must include consideration of the implications of converting private into state action in light of "the value of preserving a private sector free from constitutional requirements . . ." *Wahba v. New York University*.

492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

This delicate balancing of private and public interests is reflected in case law dealing primarily with racial discrimination under the equal protection clause of the fourteenth amendment. There the courts, recognizing that "[the fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful", *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948), have been particularly inclined to find state action.[13] The broad pronouncements articulated in some of these decisions have recently been more precisely refined, particularly in litigation free from racial overtones, suggesting that the courts are aware of the absolute necessity of preserving a "private" sector.

Thus, the solution to the state action inquiry in cases not involving racial discrimination or the fourteenth amendment cannot be gleaned simply from analysis of cases involving those factors. As this court has previously indicated:

> [W]e do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees.

Wahba v. New York University, *supra* at 100.

This restraint in applying the state action doctrine developed in discrimination cases to factual settings devoid of racial discrimination is heightened when the private entity possesses unique constitutional protections. As Justice Stewart noted in *Columbia Broadcasting System, Inc. v.*

---

[13]For example, this court has applied a less onerous test for finding state action in cases involving racial discrimination. Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974).

Democratic Nat'l Committee, 412 U.S. 94 (1973) [hereinafter cited as *CBS v. DNC*], with regard to broadcasters, "[b]efore woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or 'company towns,' we must look more closely at the structure of broadcasting and the limits of governmental regulation of licensees." 412 U.S. at 134.

The reason for this different standard is obvious. While there is little public or private value in protecting private actions dedicated to discrimination on the basis of racial prejudice, there is a strong interest in preserving a private sector particularly when that sector is accorded special constitutional protections.

There can be no doubt, therefore, that the unique factual setting of this case requires the most demanding review before the actions of this private entity, Western, and its employees be subjected to the consequences of a state action finding. The first amendment rights of broadcasters are at stake and the costs of finding state action are heavy. Neither the purposes of the Constitution nor the intent of existing state action precedent would be satisfied by transforming a broadcaster into the federal government. The court below erred in failing even to begin the necessary balancing process; and it instead erroneously applied inapplicable state action holdings to a clearly distinguishable factual situation.

The lower court's decision presents a fundamental threat to the regulatory scheme of the broadcasting industry. The statutory approach of broadcast regulation since the Radio Act of 1927[14] and the Communications Act of 1934[15] is premised on the need for an efficient allocation of a limited number of frequencies. The result is a system of broad-

---

[14] 44 Stat. 1162 (1927).

[15] 48 Stat. 1064, 47 U.S.C. §151 et. seq. (1970).

casting in this country consisting of the licensing of private entities under a public interest standard. However, the system of licensing is unique, for broadcasters have clear first amendment rights to freedom of the press. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). A delicate balance has been struck in this regulatory framework. Broadcasters are accorded substantial freedom to exercise their own journalistic and editorial judgments subject only—in highly limited circumstances—to the overriding concern for the public interest. This public interest standard, and the Commission's role in enforcing it, have been interpreted to allow only the minimum amount of regulatory oversight of broadcasters' programming decisions consonant with serving the public interest.[16] The lower court in finding state action failed to consider the broadcaster's first amendment rights, the prohibition on governmental censorship of broadcasters and the delicate nature of the regulatory scheme established by the Communications Act. The court's decision creates the framework for the total loss of broadcasters' constitutional rights and the destruction of a carefully conceived and approved regulatory scheme.

The fact that the plaintiffs are asserting their purported first amendment rights is not persuasive in reviewing the state action claim. In *Hudgens v. NLRB, supra,* and *Lloyd*

---

[16]As the Court in *Pacifica Foundation v. FCC,* No. 75-1391 (D.C. Cir., Mar. 16, 1977) stated:

> There is no doubt that the regulatory authority of the FCC encompasses more than the technical engineering aspects of the broadcast medium. Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, including broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act.

Slip. Op. at 13.

Corp. v. Tanner, 407 U.S. 551 (1972), the Supreme Court held that state action was not present despite the fact that the parties were claiming a violation of their first amendment free speech rights.[17] This is doubly true where, as in this case, the actions of broadcasters have first amendment protection.

B. The District Court Failed to Consider the Radio Station's First Amendment Rights in Resolving the State Action Question.

By approaching plaintiffs' claims from a narrow state action viewpoint, the court ignored the statutory framework of the broadcasting industry carefully conceived by Congress and approved by the courts. The proper starting point for analysis is recognition that the challenged actions were those of a private entity which is part of the press protected by the first amendment from governmental censorship. In this light, the court should have initially determined whether there existed either direct governmental compulsion of the private actions or an identity between the government and the private actors. Absent extraordinarily clear evidence of such direct governmental compulsion or identity of interests, further state action analysis was necessarily a direct infringement of the first amendment press freedoms accorded Western as a broadcaster.

The private actions of a private broadcaster are matters uniquely encompassed by journalistic and editorial discretion. The framers of the Constitution specifically prohibited the government from exercising such editorial functions lest the freedom of the press become a hollow guarantee. When the lower court transforms the broadcaster/editor into the government, the necessary corollary is a denial of the editor's first amendment rights. To justify

---

[17] In both *Lloyd Corp. v. Tanner and Hudgens v. NLRB*, the Supreme Court held that there was no first amendment, freedom of speech, right to enter a shopping center to distribute handbills or picket with placards.

such a result on the basis of other first amendment claims does not address the fundamental question of whether such a decision comports with the protections accorded the free press.

As noted, the regulatory scheme licenses private broadcasters to operate facilities in the "public interest, convenience and necessity."[18] Accompanying this obligation to operate in the public interest is the explicit recognition that broadcast licensees are not common carriers.[19] The legislative history of the Communications Act clearly shows that Congress debated and rejected the idea of broadcast licensees being required to act as a common carrier. *See* S. Rep. No. 772, 69th Cong., 1st Sess.4 (1927). Section 3(h) of the Act, 47 U.S.C. §3(h), clearly removes broadcasters from the common carrier status. Thus, broadcasters are under no obligation to sell time to any individual or group desiring to transmit its particular message but rather, exercise the editorial functions of selecting and rejecting material to be broadcast. Broadcasters are solely responsible for the exercise of such journalistic judgments and are

---

[18]47 U.S.C. §§307(a), 309(a), 310(b), (1970).

[19]If broadcasters were common carriers within the meaning of the Act, they would be subject to Sections 201 and 202, 47 U.S.C. §§201-02 which provide, in pertinent part:

> §201(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . .
>
> §202(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

held broadly accountable by the FCC for their decisions.[20]

In addition, the regulatory scheme provides that broadcast licensees shall be protected from governmental censorship. Section 326 of the Act provides that:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Enactment of this section was a clear recognition that broadcasters, not the FCC, are the editors of the electronic "press." The Senate Report regarding the 1948 amendment to Section 326 states:

> [S]ection 326 . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition that would interfere with the right of free speech by radio.

S. Rep. No. 1567, 80th Cong., 2d Sess. 13014 (1948).

The broadcaster's editorial right to reject programs or advertisements was further extended into the political arena. Section 315(a) [second sentence] provides that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." Consistent with these important rights accorded broadcasters, the government acting through the FCC has engaged in regulation of broadcasters' programming and editorial decisions only in the most general terms. Such regulation is a delicate com-

---

[20]En Banc Programming Inquiry, 40 F.C.C. 2303, 2313-14 (1960).

bination of first amendment privileges and public interest obligations. The FCC has recognized the danger of reading the public interest so broadly that it engulfs the first amendment.[21] The courts have similarly seen the potential first amendment dangers from Commission regulations, particularly in the realm of programming.[22] The Commission and the courts have honored this constitutional distance which must be maintained between broadcasters and the government in order to preserve a free press.

In *CBS v. DNC, supra,* a majority of the Court in an opinion written by Chief Justice Burger, agreed with the FCC's conclusion that nothing in the Communications Act of 1934 requires that individuals or groups have a right to purchase broadcast advertising time for editorial, as opposed to commercial, purposes.[23] While the Court's

---

[21]Washington Star Communications, Inc., 57 F.C.C.2d 475 (1976); National Ass'n of Theater Owners of Indiana, 24 F.C.C.2d 483 (1970); Democratic National Convention Television Coverage, 16 F.C.C.2d 650 (1969).

[22]Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976); Pacifica Foundation v. FCC, No. 75-1391 (D.C. Cir., Mar. 16, 1977). In *Pacifica,* the court overturned an FCC ruling banning the broadcast of certain "obscene" speech at certain times of the day because "[i]n promulgating the *Order,* the Commission [had] ignored both the statute which forbids it to censor radio communications and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee." Slip Op. at 8 (footnotes omitted). In *Straus,* the court in vacating an FCC ruling that a radio station had violated the "personal attack" rule, noted that "[t]he abiding First Amendment difficulties, however, along with an appreciation of Congress' intent in enacting the Communications Act, have engendered an important corollary: the licensee is to have the maximum editorial freedom consistent with its position as public trustee of a portion of the airwaves." 530 F.2d at 1008 (footnote omitted).

[23]The four consolidated cases arose out of two separate petitions made to the FCC. One was instituted by the Business Executives' Move

(continued)

decision did not turn on a state action question, the plurality opinion of Chief Justice Burger and Justices Stewart and Rehnquist rejected the contention that government regulation of broadcasters is sufficient to constitute a finding that broadcaster action is state action. Noting that the Commission had not "fostered" the broadcasters' actions under challenge and that the government was neither a partner with nor "symbiotically related" to the broadcasters, the Chief Justice's opinion concluded that "the First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts" 412 U.S. at 119.

In resolving the state action question, the plurality opinion placed particular emphasis on the broadcast regulatory scheme which was designed to maintain "a substantial measure of journalistic independence for the broadcast licensee" *Id.* at 116. This journalistic independence of broadcasters had resulted in a practical scheme where the broadcast licensee was primarily and initially responsible for the fairness, balance and objectivity of its programming. The government acting through the FCC played a distant role in reviewing only where a pattern of abuse of discretion was proven. This delicate regulatory

[23](continued)
For Vietnam Peace whose spot editorial advertisements against the war in Vietnam had been refused by a radio station in Washington, D.C. The second petition filed by the Democratic National Committee sought a declaratory ruling that the first amendment and the Communications Act do not permit a broadcaster to follow a policy of refusing advertising by responsible entities commenting on public issues. In each case, the FCC upheld the broadcasters' policies against both the statutory and constitutional challenges. The United States Court of Appeals for the District of Columbia Circuit, over one dissent, reversed and held that the first amendment prohibits a total ban on paid editorial advertisements "at least when other sorts of paid announcements are accepted." Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* CBS v. DNC, *supra.*

scheme was designed "to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act" *Id.* at 117. The Chief Justice also noted that the broadcast regulatory scheme was not as pervasive as that encountered by the court in *Public Utilities Comm'n v. Pollak, supra* and, more importantly, that the Court in *Pollak* "was concerned with a transportation utility that itself derives no protection from the First Amendment." The same first amendment protection accorded broadcasters which is at issue here was the central element in the plurality's solution to the state action equation.

This discussion of the state action question in *CBS v. DNC* (Part III) represents a plurality opinion that is entirely consistent with the logic underlying the majority's reasoning in Part IV. The Court there posed the question of whether the "public interest" standard of the Communications Act or the first amendment, assuming governmental action, requires broadcasters to accept editorial advertisements. Answering in the negative, the majority again emphasized the importance of the "journalistic discretion of broadcasters" and the "limited degree of government surveillance." The Court held that neither the first amendment nor the "public interest" standard, which it found invite reference to first amendment principles, required that the FCC mandate a private right of access to the broadcast media.

The Court recognized the incongruity of substituting private editorial judgments for those of the government and concluded that:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors-newspaper or broadcast-can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of

> the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

412 U.S. at 124.

In rejecting a right of access to private individuals or groups, the Court observed that recognition of such a constitutional right would inevitably push the Commission into case-by-case review of licensee programming decisions. *Id.* at 126-27.

As with the plurality's opinion in Part III, the majority's decision in Part IV was influenced decisively by the belief that a constitutional right of access for editorial advertisements would result in excessive government involvement in the "day-to-day editorial decisions of broadcast licensees . . . ," and that the "unmistakable congressional purpose [was] to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards." *Id.* at 120. The Court in *CBS v. DNC* thus maintained the distance which has separated the broadcaster as editor and the government as overseer for more than 40 years. The Court reaffirmed the carefully circumscribed nature of government involvement in broadcasting and warned against the danger of enlargement of government control over the broadcasters' editorial decisions.

The concept of private broadcast ownership and broad journalistic discretion free from the constraints of detailed regulation was the bulwark of the *CBS v. DNC* decision. This position is the only one consistent with the Congressional scheme of broadcasting within the structure of the private enterprise system and was foreshadowed by the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In that case, the Court specifically upheld certain aspects of governmental regulation of broadcasting,

i.e. the personal attack and political editorial portions of the Fairness Doctrine.[24] However, the *Red Lion* decision rested on the Court's reaffirmation of the first amendment press freedoms of broadcasters. *Id.* at 396. The regulation approved by *Red Lion* was only that minimally necessary to satisfy the public interest standard. *Red Lion* did not authorize a case-by-case review of broadcasters' editorial decisions or the substitution of private journalistic judgments with those of the government. Nor could such a construction of the Communications Act have survived *CBS v. DNC*. The Court's objective in both cases was to honor these private editorial functions consistent with a broad public interest standard.

The importance of this principle can be seen most clearly in the present case where a court decision threatens the very existence of a broadcaster's journalistic functions. In *Red Lion*, the Court noted that the personal attack and political editorial rules then under discussion were indistinguishable from the equal-time provision of Section 315 which requires that broadcast stations set aside reply time for political candidates under specified circumstances. 395 U.S. at 391. It is the equal time and no censorship provisions of Section 315 that are at issue in the present case. Just as the Court's decision in *Red Lion* (regarding the personal attack and political editorial rules), did not extinguish the broadcaster's first amendment rights, the application of Section 315 likewise does not extinguish the broadcaster's press freedoms.

---

[24]These are among the limited specific grants of access to broadcast time. In addition to the "personal attack" and political editorializing regulations [47 C.F.R. §§73.123, 73.300, 73.598, 73.679 (1976)] (persons who have been attacked over the air and opponents of candidates who have been endorsed by the station over the air must be given broadcast time in which to reply)], there is the "equal opportunities" provision for legally qualified candidates [47 U.S.C. §315(a)(1970) (broadcaster must provide equal broadcast time to opponents of political candidate who has "used" broadcast facility)].

The equal opportunities provision of Section 315 does impose a ministerial burden on broadcasters once certain prerequisites are met, i.e. an initial "use" by a candidate; but there remains a compelling constitutional need to recognize the overall journalistic context of such circumstances. Broadcasters retain the editorial discretion to choose when non-federal candidates' views will be aired, if at all, and concomitantly many of the time, place and manner attributes of such political presentations.[25]

The Fairness Doctrine and more particularly Section 315 are consistent with broadcasters' first amendment rights. As the Court explained in *Red Lion*, serious first amendment issues would be raised were it presented with governmental censorship of a particular program contrary to Section 326, or with official government views dominating public broadcasting, or with a specific Commission refusal to permit broadcasters to carry particular programs or to publish their own views or with a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways. 395 U.S. at 396.

The point of *Red Lion* is that the Supreme Court will allow some minimum governmental regulation of broadcasters, as envisioned by the Communications Act, but with a special sensivity to the broadcaster's first amendment rights. And it is clear after *CBS v. DNC*, that the Court's approval of any such government regulation must maintain considerable distance between the government and the broadcaster as editor.

---

[25]In administering Section 315, broadcasters have considerable discretion with respect to the selection of broadcasts of political candidates. Congressional amendments to the Communications Act in 1959 created four types of programs exempt from the "use" status. These categories are: bona fide newscasts, bona fide news interviews, bona fide news documentaries and on-the-spot coverage of bona fide news events. Broadcasters have the initial editorial responsibility of determining whether a candidate's appearance triggers an equal opportunities obligation or, instead, falls within one of these exempt categories. *See* Section 315(a)(1)-(4), 47 U.S.C. §315(a)(1)-(4).

However the lower court's decision is read, it subverts the Supreme Court's interpretation of the regulatory scheme. The court's holding on the state action question cannot be reconciled with the *CBS v. DNC* and *Red Lion* decisions. To hold that editorial actions of broadcasters are state action clearly violates the first amendment.

To limit the applicability of such a holding to broadcasters who are solely licensed to a community is no less destructive of constitutional rights. In addition, the lower court's purported caveats on the breadth of its holding do not alleviate the constitutional infirmity of the decision.[26] Each limiting factor proposed by the court, i.e. monopoly versus oligopoly market, political access versus non-political access, free speech rights of broadcaster versus non-free speech areas, is simply not susceptable of accurate determination. Each involves editorial and journalistic functions and would, therefore, be matters of subjective decision-making by broadcasters.[27] The result of such a limiting process would be to involve the Commission in a

---

[26]The lower court's decision is, in fact, premised on the plaintiffs' recovery of damages for violation of the Communications Act; more specifically Section 315. However, courts have been unanimous in holding that the Communications Act does not give rise to a private cause of action. *See* Daly v. Columbia Broadcasting Sys., Inc., 309 F.2d 83, 86 (7th Cir. 1962); Writers Guild v. FCC, 423 F. Supp. 1064, 1084 (C.D. Cal. 1976); Ackerman v. Columbia Broadcasting Sys., Inc., 301 F. Supp. 628, 631 (S.D.N.Y. 1969); Gordon v. National Broadcasting Co., 287 F. Supp. 452, 455 (S.D.N.Y. 1968). As the Supreme Court stated in *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942), "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications."

[27]With regard to the lower court's suggestion that the political aspect of plaintiffs' complaint is decisive, the Supreme Court has noted that, "[w]e see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals." *CBS* v. *DNC*, *supra* at 127 n.21.

case-by-case investigation into each alleged state action of broadcasters to determine if one or more of the limiting factors existed. Such a case-by-case review would reduce the distance between the government and the broadcaster as editor so severely that the government would be forced to continually exercise final editorial judgment. The consequence would be governmental decision-making instead of private journalism. This form of close, constant review was not approved by the Court in *Red Lion.*[28]

C. The District Court Erred in Basing Its State Action Holding on the Federal Communications Commissions' Frequency Allocations

While the basis for the lower court's finding of state action is not entirely clear it appears that the major, if not decisive, factor was the court's consideration of the FCC's allocation of broadcast frequencies in Stamford. After noting that "the government has ensured that one radio station will have a monopoly of Stamford local airways" (J.A. 170) and that "by giving Western monopoly control over the local airways, federal regulation has invested Western with the capacity to obstruct free speech" (*Id.*), the court concluded that "it is the government's restrictions on competitive entry that magnify the impact which its licensee's decisions can have on free speech" (J.A. 171). Thus, according to the court Western enjoys a governmentally created monopoly of the Stamford airways sufficient to transform Western's actions into actions of the state for purposes of imposing constitutional constraints.[29]

Aside from the factual inaccuracy of characterizing Western's radio stations as constituting a monopoly, the lower court erred in its evaluation of the impact of such a

---

[28] *Red Lion, supra,* 395 U.S. at 377, 395-96.

[29] As discussed in notes 40-41, *infra,* the court's monopoly finding fails to consider the nature of the technical characteristics of broadcasting and the effect of the Commission's allocation of frequencies.

finding.[30] The existence of a monopoly, or even partial monopoly, has been rejected as a basis for finding state action and recent Supreme Court decisions have explicitly rejected such a basis for converting private action into governmental action.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court rejected a due process challenge to an electricity cut-off by a heavily regulated private utility company. In rejecting the argument that state action was present because of the monopoly status conferred on the company by the state, the Court held that:

> [A]ssuming that [the state] had [granted the company a monopoly], this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment.

419 U.S. at 351-52.

Although noting that the utility company was subject to extensive state regulation[31] the Court, nevertheless stated that:

> It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these charac-

---

[30]The record does not contain a factual basis to support this conclusion. The only evidence is that under the Commission's frequency allocation scheme WSTC and WYRS are the only stations licensed—as distinct from providing service—to Stamford (J.A. 67).

[31]Interestingly, this utiliy was subject to the same state regulatory scheme as common carriers and telephone and telegraph companies. 419 U.S. at 350 n. 7. Such carriers are subject to considerably more extensive regulation than broadcast stations which, as noted above, have been specifically exempted in the federal regulatory scheme from the obligations of common carriers.

> teristics. But the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

419 U.S. at 350-51.

The Supreme Court in *CBS v. DNC, supra* noted that Congress had refused to adopt proposals to regulate broadcasters as public utilities when drafting the Communications Act of 1934. 412 U.S. at 105-08. Instead, Congress opted for a vastly different regulatory framework of private broadcasters regulated by the government free of common carrier obligations, *Id.* at 107-08, and protected from government censorship. *Id.* at 109-10.[32]

In *Public Utilities Comm'n v. Pollak, supra*, the Court expressly disclaimed reliance upon a congressionally granted monopoly power (to the transit authority) in dealing with a state action question. *Id.* at 462. The Court in *Jackson* reiterated this interpretation of its *Pollak* decision. 419 U.S. at 352. In rejecting the monopoly argument in *Jackson*, the Court pointed to the "natural" monopoly status of public utilities and noted that "[r]egulation was superimposed on such natural monopolies as a substitute for competition and not to eliminate it." 419 U.S. at 351 n.8. Thus, the purpose of the state's regulatory scheme was found relevant by the Court.[33]

---

[32]As Justice Stewart accurately noted in *CBS v. DNC, supra*, "if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers." 412 U.S. at 140. Such a result violates not only the constitutional guarantees of broadcasters but the statutory freedoms accorded broadcasters by Congress.

[33]In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Supreme Court also rejected a state-created partial monopoly as the basis for a state action holding. In that case, petitioners urged the Court to treat a private club's racially discriminatory policies toward member's guests as state action because, *inter alia*, the club held a state liquor license. The Court declined to find state action. 407 U.S. at 177.

Western simply has no monopoly of the airways, local or otherwise, or at least no element of monopoly not present in every radio and television station. However, as in *Jackson*, whatever element of monopoly is present in broadcasting is a result of the public interest goals of efficient technical frequency allocations. To the extent that defining a broadcaster's particular frequency as a monopoly is at all accurate, it is obvious that it is a partial monopoly of limited effect at best. Accordingly, the holdings of the *Jackson*, *Moose Lodge* and *Pollak* cases do not support the finding of state action by the lower court.[34]

The lower court's monopoly analysis results inevitably in a finding that broadcaster action *per se* is state action.[35] This is contrary to all relevant precedent.[36] Lower courts have been unanimous in rejecting the contention that broadcaster action is state action. In *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the court rejected plaintiffs' argument that radio station WPEN had violated their first amend-

---

[34]The district court's state action holding is contrary to these Supreme Court decisions. Under the district court's reasoning, the actions of the Metropolitan Edison Company would have been state action since, but for the state's grant of a certificate to the company, it would have been unable to conduct its business and, hence, terminate the customer's electricity. Likewise, the rationale of the lower court's ruling would dictate that the actions of the Moose Lodge be considered state action because, but for the state-issued liquor license, the club would have been in no position to refuse service to the plaintiffs.

[35]This follows from the fact that to the extent Western has any government-created monopoly, every broadcast station has a similar position. And if it is this state-created monopoly that is important, then all actions of all broadcasters flow naturally from this preferred position.

[36]In *Business Executives' Move For Vietnam Peace v. FCC*, 450 F.2d 462 (D.C. Cir. 1971), a divided court of appeals held otherwise but this decision was subsequently reversed by the Supreme Court in *CBS* v. *DNC*, *supra*.

ment rights by refusing to broadcast their programs. The basis for the court's holding was the absence of any state action. As the Third Circuit stated:

> [T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind.

151 F.2d at 601.

The court rejected the state action argument as a result of a state-granted monopoly by noting that, "a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.*[37] In very similar circumstances, the First Circuit reached an identical result in denying a first amendment claim based on a radio station's refusal to broadcast a particular program submitted by the plaintiffs. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950). In that case, the actions of radio station WLAW, Lawrence, Massachusetts, then the only radio station licensed to the community,[38] were held not to be actions of the federal government subject to the first amendment. 183 F.2d at 501.

In *Post v. Payton*, 323 F. Supp 799 (E.D.N.Y. 1971), a radio station's employees and listeners filed suit claiming that the closing of the station violated their first and four-

[37]The Third Circuit reaffirmed *McIntire* in *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[38]Broadcasting Yearbook 1976 at C-93.

teenth amendment rights. The court, declaring that "[b]efore the plaintiffs may recover for an alleged violation of these Amendments, they must show that the defendants' conduct was equivalent to either State or Federal action," 323 F. Supp. at 803, rejected plaintiffs' state action claims. The court, finding that "the broadcast licensee is a private entity" who was not performing a governmental function concluded that:

> To hold that the licensing by the Federal Government of a broadcast frequency endows the recipient with the quality of an agency of the Federal Government would be an unreasonable interpretation of government action.

323 F. Supp. at 804.

Likewise, in *Smothers v. Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972), the court held that the FCC's regulation of CBS did not convert the private actions of CBS, in "censoring" plaintiff's programs, into governmental or state action subject to the first amendment. Another district court reached the same conclusion regarding a broadcaster's actions in *Moro v. Telemundo, Inc.*, 387 F. Supp. 920 (D.P.R. 1974). In that case television station WKAQ cancelled the scheduled live appearance of the plaintiff, who then filed suit claiming violation of his first amendment rights. The court rejected his first amendment claim. Holding that "the essence of plaintiff's argument [was] that the Federal Government, through the Federal Communications Commission . . . , by licensing defendant . . . , transform[s] the action of the license[e] into a Federal Governmental Action for First Amendment purposes", the court concluded that such licensing did not result in governmental action. 387 F. Supp. at 924-25.[39]

[39]The court noted elsewhere that "[the] mere fact that the defendant obtained a license from the Federal Communications Commission does not transform this action into state action." 387 F. Supp. at 924.

Most recently, in *Writers Guild v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), the court rejected the argument that broadcasters' actions, without government involvement, were state action subject to the restrictions of the first amendment. The court instead found that broadcasters' adoption of the "family viewing policy" was the result of FCC "pressure," and consequently was the equivalent of governmental action. 423 F. Supp. at 1140-43. The court's reasoning was based on the presence of governmental pressure, and not the FCC's licensing of broadcasters, as the determinative factor.

It is obvious that neither the Supreme Court, in dealing with monopoly or partial-monopoly situations, nor lower courts in specifically addressing broadcasters' actions can support the finding below of state action based on the FCC's assignment of specific frequencies in the radio spectrum to Western.

Furthermore, the court below failed adequately to analyze the nature of the broadcasting industry[40] and the FCC's licensing scheme[41] in reaching its monopoly con-

---

[40]While Western is licensee of the only two radio stations licensed to Stamford, the inquiry cannot end there. Radio and television signals do not stop at city or state boundaries and, thus, to focus only upon a city's licensed stations ignores the extent of that locality's broadcast service. Stamford may have only two licensed stations, but it is served by a myriad of other radio and television signals from many other nearby stations including those licensed to New York City. Thus, the suggestion that Western has a "monopoly" of the local airways is simply inaccurate. It is no more meaningful than concluding that a local manufacturing company has a local monopoly of its products because it is the only such manufacturer located in the city. As is obvious, the inquiry must encompass all competing suppliers wherever they may be located. *Cf.* Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) ("many respects in which the southwestern corner of Connecticut and New York City, although divided by a state boundary, are economically and intellectually one").

[41]Of course, every broadcaster has a mo.opoly of sorts regardless of the number of stations licensed to a community. Each radio and

(continued)

clusion. The facts do not support such a holding. In any event, even assuming such a partial monopoly by Western of the airways, it is an insufficient basis for undermining both the long-established statutory scheme and Western's own first amendment rights in order to convert private action into state action.[42]

If indeed the lower court relied on the FCC's allocation of broadcast licenses, i.e. the grant to Western of a "monopoly", then the purported limitations of the court's holding simply do not apply. The court's caveats that it was not discussing "programming of a different character" or the "free speech rights of the broadcaster" are lost in the court's primary reliance on the monopoly issue. A finding of state action on the basis of the FCC's grant to Western of licenses for the two radio frequnecies assigned to Stamford would be equally applicable to all its editorial functions, and would apply regardless of whether or not the editorial actions of Western were protected by the first amendment. In fact, such a holding must apply regardless of the number of stations licensed to a community for each station is

---

[41](continued)
television station is assigned to operate on a specific frequency. As a result of FCC licensing standards, every broadcast station thus has a sphere of coverage within which it has the unique, i.e. "monopoly", power to broadcast. Indeed, there are 2219 communities like Stamford where one entity is licensed for the only radio station[s]. Broadcasting Yearbook 1977. This right to a particular frequency conveys the power to control the programming and advertising which reaches the citizenry over that channel in that geographic service area.

[42]Moreover, the lower court's view of broadcasting results in one of two anomalous results. Either all actions of all broadcast stations are actions of the state as a result of their receipt of a unique channel assignment from the FCC, or only those actions of the thousands of broadcast stations which are solely licensed to a particular community are actions of the State. The first result is a total subversion of the carefully conceived structure of broadcast regulation. The alternative result, while no less destructive of broadcasting, is even more unacceptable in light of the random nature of such a conclusion.

unique and occupies a unique frequency from which it may "obstruct" free speech. Such a holding would be destructive of the constitutional scheme of a free press.

D. The District Court Erred in Basing Its State Action Holding on the Federal Communications Commission's Regulation of the Radio Station.

To the extent that the lower court's finding of state action rests on the FCC's regulation of Western it is similarly in error. Though agreeing that government regulation does not always convert private conduct into governmental action (J.A. 170), the court cites, but subsequently ignores, the importance of finding a nexus between the state and the challenged action of the regulated entity. Yet the total absence of any nexus between the FCC's regulatory role and Schwartz's review of the candidates' scripts is determinative on this point. The cases are clear that absent any government order, encouragement of, cooperation in, or approval of the challenged activity, general regulation is insufficient to constitute state action. The lower court cited the Supreme Court's decisions in *Jackson, Moose Lodge* and *Pollak* but failed to apply the tests articulated in those cases for analyzing the effect of government regulation on the actions of private entities. A proper application of these standards negates the inference that the actions of WSTC can be equated with the government because of the FCC's regulation of Western.

Before reviewing the applicable precedent concerning the effect of governmental regulation on private actions, it is worth summarizing the factual setting presented to this court. During the 1969 Stamford mayoral campaign, the radio stations' general manager, Julian Schwartz, consistent with his policy of applying a good taste standard to materials to be broadcast, reviewed the scripts of two mayoral candidates. At times, this review resulted in changes in the scripts. Mr. Schwartz's review procedure was consistent with station policy. His insistence on

changing some of the scripts was not, however, approved by the licensee, Western. In any event, Schwartz's policies had not been ordered, requested, encouraged or cooperated in by the FCC. Nor were they approved, explicitly or implicitly, by the Commission which subsequently fined Western for Schwartz's conduct. The challenged action of the regulated entity, Western, was thus neither fostered nor acquiesed in by the government. In fact, it was specifically disapproved by the FCC.

The question of the effect of extensive governmental regulation on private actions was presented to the Court in *Jackson v. Metropolitan Edison Co., supra.* In that case, the Supreme Court refused to find the regulation by the Pennsylvania Public Utilities Commission of electrical utilities sufficient to support a finding of state action in a company's failure to provide a hearing before termination of service. Metropolitan Edison, a privately owned and operated corporation, held a certificate of public convenience from the state and was subject to extensive regulation by the state ("in a way that most other business enterprises are not," 419 U.S. at 358).[43]

The Court viewed the state action inquiry as whether "there is a sufficiently close nexus between the state and the *challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351 (emphasis added). Viewed from this perspective, the actions of the utility in terminating service were held not to be state action. Despite the fact that the state Public Utilities Commission had passed on the company's general tariff, which contained the contested termination provision, the Court rejected the notion that the state had "'specifically authorized and approved' the termination practice." 419 U.S. at 354. Thus, the *Jackson*

[43] The Pennsylvania PUC had control over utility rates and over the character and quality of utility services and facilities, had the power to investigate complaints and to regulate the activities, rules and contractual undertakings of utilities. 419 U.S. at 362 n.5.

decision is explicit that direct state involvement in the challenged activity of the private entity is a prerequisite for finding state action in a governmental regulatory context.

The Court's decision in *Jackson* is but the most recent statement of the impact of regulation on the state action question. It is entirely consistent with the Court's longstanding approach to this question. In *Public Utilities Comm'n v. Pollak, supra,* the Supreme Court had before it a challenge to a transit company's installation of radios in its buses and the broadcast of music, news and commercial advertisements while the buses were in operation. The Court, relying on the transit company's regulation by the Public Utilities Commission and "particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby," 343 U.S. at 462, found governmental action. The nexus between the challenged activity and governmental regulation in *Pollak* was direct.

In *Moose Lodge No. 107 v. Irvis, supra,* the Supreme Court significantly narrowed the earlier *Pollak* holding and took a major step in eliminating the significance of regulatory involvement for state action purposes. The plaintiff brought suit under the fourteenth amendment alleging that a private club's discriminatory guest and membership policies should be treated as state action because the club was licensed and regulated by the state. The district court, relying upon the uniqueness and pervasiveness of the state's regulatory scheme, revoked the club's liquor license.[44] In reversing, the Supreme Court accepted the thoroughness of the regulatory involvement but rejected its significance.

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster

[44]Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970).

> or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

407 U.S. at 176-77.

The Court simply did not accept á "state action" consequence from such "complete and pervasive" regulation and explicitly distinguished *Pollak* as a case turning upon specific approval by a governmental agency of the challenged activity.[45] The Court was explicit that if regulation were to become a decisive, or even significant, factor in state action analysis, the breadth of governmental regulation would "utterly emasculate" the distinction between private and state activity. 407 U.S. at 173.[46]

This court has also recognized the dangers in attributing a governmental nature to private actions by virtue of a regultory relationship. As a result, it has required much more than the existence of state regulation to justify a finding of state action. In *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), the argument was rejected that New York's regulation of educational standards in private schools, colleges and universities made the disciplinary actions of Alfred College the acts of the state:

> [T]he essential point [is] that the state must be involved not simply with some activity of the institution alleged

---

[45]The Court noted that:

> Unlike the situation in Public Utilities Comm. v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge. 407 U.S. at 176 n.3.

[46]This danger of overextending the state action doctrine was acknowledged by the Court even in cases involving racially discriminatory action. In a situation not involving such discrimination but involving the private actor's first amendment rights, as is present here, the danger is infintely greater.

> to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint.

407 F.2d at 81.

This court has consistently applied the principle that state regulation unrelated to the challenged activity is insufficient to establish state action. *See New York City Jaycees, Inc., v. United States Jaycees, Inc.*, 512 F.2d 856, 858 (2d Cir. 1975); *Weise v. Syracuse University*, 522 F.2d 397, 405 (2d Cir. 1975). The state action cases that have stressed the heavy presence of government regulation are those in which private institutions are carrying out state policy against the plaintiffs or in which the state is benefiting directly from the private activity. This is the very point made by the Supreme Court in discussing the regulations of the Pennsylvania Liquor Control Board in *Moose Lodge, supra*, and of the Public Utilities Commission in *Jackson v. Metropolitan Edison Co., supra*.

The existence of such a direct and substantial link between the government regulation and the private action which is challenged is totally absent in the present case. The FCC did not order, request, encourage or approve Schwartz's actions in reviewing the candidates' scripts. Nor did the FCC merely permit such actions or refuse to act when it received a compliant.[47] As Chief Justice Burger noted in *CBS v. DNC*, "[m]oreover, the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action. . . " 412 U.S. at 118.

---

[47]Even such Commission acquiescence in private actions will not necessarily trigger a state action finding. In *McIntire v. Wm. Penn Broadcasting Co., supra*, where the court refused to hold a station's refusal to broadcast plaintiff's programming to be state action, the Commission had specifically ruled on, and implicitly approved, the station's actions. 151 F.2d at 599-600 and n.7. *See also* CBS v. DNC, *supra*.

The lower court's treatment of this aspect of governmental regulation is inadequate. The court rejected the importance of the lack of governmental encouragement or approval of the challenged activity by noting that "[t]he mere fact that conduct is prohibited by the government's own law does not mean that it cannot be governmental action for purposes of the fourteenth amendment and the Bill of Rights" (J.A. 171). This statement, and the case cited in support of it, assume the presence of state action in the first place. For example, in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), the Court was faced with the question of whether acts of municipal officials, if unlawful under state law, could still be held actions of the state subject to the fourteenth amendment. A California utility had challenged tne city's utility rate ordinance as an unlawful confiscation of property in violation of the fourteenth amendment. The district court dismissed the suit for lack of jurisdiction holding that there could be no Constitutional violation until the state courts had ruled that the state had authorized its officers to do acts in violation of the state constitution.[48] The Supreme Court reversed, concluding that when a state officer or state agency acts in violation of the fourteenth amendment there is federal jurisdiction to review that action regardless of whether the state had authorized the wrong. 227 U.S. at 288, 295-96.

Thus, the Court in *Home Telephone* was faced with acknowledged acts of state officials. The district court's reliance on this decision, therefore, begs the very question presented to it, *i.e.*, whether there is state action in the first instance. The lower court was not faced with the question of whether actions of the state need be lawful before becoming subject to constitutional constraints, but rather whether there has been any state action.

---

[48]The alleged violation of the fourteenth amendment would also be a violation of the state constitution.

The FCC's disapproval of the private actions in this case breaks the nexus necessary to establish state action as a result of the regulatory scheme.[49] *Home Telephone* simply does not discuss the central question posed by *Jackson* of direct governmental involvement in the challenged activity of private entitites.

The court below, in discussing the regulatory basis for its finding of state action, also cited *Marsh v. Alabama*, 326 U.S. 501 (1946), for analagous support for its holding. Since that case articulated the "public function" theory of state action, the inapplicability of that theory to the present case will be briefly discussed. In *Marsh*, the Court held that where a private company owned and operated an aggregation having "all the characteristics of any other American town," with streets and public places generally open to all, the private ownership would be disregarded and constitutional constraints imposed. The concept that private assumption of governmental power could constitute state action also extends to activities so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by private agencies. *See Smith v. Allwright*, 321 U.S. 649 (1944) (party primaries).[50]

Since those early decisions, the courts have more clearly delineated the severe limitations of this "public function" theory. In determining whether a private entity is exercising powers traditionally reserved exclusively to the states, the Supreme Court has stated that "the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the

---

[49]If, as the district court suggests, Commission disapproval of private broadcaster action is irrelevant to the state action inquiry, then every broadcaster action would be rendered state action whether or not it is reviewed by the FCC and whether or not the FCC finds that the activity was not contrary to the Statute and/or Commission Rules.

[50]This case was also cited by the lower court (J.A. 171).

same kind of undertaking suffers the same constitutional limitations." *Evans v. Newton*, 382 U.S 6 (1966). Accordingly, this court has applied the theory only to those services which are "so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency." *Powe v. Miles, supra* at 80.

Furthermore, in *Jackson v. Metropolitan Edison Co., supra*, the Court emphasized that the proper application of this doctrine rests on the exercise by a private entity of some power "which is traditionally associated with sovereignty." 419 U.S. at 351. The actions sought to be equated with the state must not only be traditionally the exclusive prerogative of the state but must, in addition, be ones which the state itself is under an affirmative duty to provide. *Id.*[51]

Western, as a broadcast licensee, is not performing a governmental function.[52] The provision of broadcasting services is not one "traditionally associated with sovereignty" and certainly the government is under no affirmative duty to provide such a service. In fact, just the opposite is true in the United States, where government has scrupulously avoided exercising any domestic press functions. The scheme of broadcast regulation envisioned by the Communications Act recognized the overwhelming private attributes of the broadcasting industry and implemented this with a very limited role of government interference. The essentially private function of

---

[51] In *Jackson*, the Court declined to find state action on a public function theory despite the fact that the defendant was a utility company, providing an essential public service, under a state-protected partial monopoly subject to extensive state regulation. The Court rejected any expansion of the public function theory into a broad principle "that all businesses 'affected with the public interest' are state actors in all their actions." 419 U.S. at 353.

[52] Post v. Payton, *supra* 323 F. Supp. at 803-04.

broadcasting was honored through prohibitions on governmental editorial decision-making,[53] recognition of private enterprise,[54] and the absence of regulation of programs, business management or policy of broadcasters.[55]

Western's operation of a radio station is not the equivalent of a "company town" (*Marsh v. Alabama*), or a pre-primary election (*Terry v. Adams*, 345 U.S. 461 (1953)), or the exercise of the power of eminent domain (*Jackson*, *supra* at 353). If there is a functional equivalent for a broadcast station it is a private newspaper which, like the broadcast media, provides communications protected by the first amendment from governmental censorship. The Court has held that provision of newspaper communications is not a public function subject to the constraints properly imposed upon the state. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Thus, radio stations are not providing public functions that might, under the *Marsh* theory, transform private into state action.[56]

Finally, there is absent in the present case the symbiotic relationship presented in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), which would justify a finding of state action.[57] The Court rejected the application of this "joint partnership" theory in *Jackson* noting that the utility was a privately owned company, leasing no space

---

[53] Section 326, 47 U.S.C. §326 (1970).

[54] *See* CBS v. DNC, *supra* at 116.

[55] FCC v. Sanders Brothers Radio Station, 308 U.S. 470, 475 (1945).

[56] The Supreme Court has sharply diminished the reach of the *Marsh* holding. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 568-69 (1972).

[57] In *Burton*, a private lessee who practiced racial discrimination leased restaurant space from a state parking authority in a publicly owned building. The Court held that the state had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. 365 U.S. at 725.

from the state, and solely responsible for the provision of electricity to its customers. The existence of extensive state regulation did not alter the fact that the state and the utility were not joint venturers. 419 U.S. at 358, *citing, Moose Lodge, supra* at 176-77 ("However detailed this type of regulation may be in some particulars it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."). Similarly, in *CBS* v. *DNC*, the plurality opinion rejected the "partnership" or "symbiotic relationship" basis for finding state action despite the fact that the FCC had approved the broadcaster actions there under challenge. 412 U.S. at 119.

As this court has noted, the recognition of state action in cases such as *Burton* is designed to prevent the government from endorsing and encouraging conduct in which it could not itself permissibly engage. *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 289 (2d Cir. 1975).[58] While the *Burton* principle may continue to have viability, the present case clearly falls on the *Jackson-Moose Lodge* side of the line; there is no symbiotic relationship which might be a basis for finding state action in Western's operations.

---

[58]This court found such a symbiotic relationship in *Holodnak* where the company's land and buildings were owned by the Government; most of the equipment was owned by the Government; the company paid no rent to the Government; the majority of the company's work was performed under Government contract; the company's products were shipped under Government bills of lading; the Government maintained a substantial "task force" at the company's plant; and, the company and Government had mutual financial and other interests dependent on their relationship. 514 F.2d at 289. Such Government involvement is significantly different in kind and degree from that involving Western.

II. EVEN ASSUMING STATE ACTION, THE DISTRICT COURT ERRED IN HOLDING THAT THE ACTIONS OF THE RADIO STATION AND ITS EMPLOYEES CONSTITUTED A VIOLATION OF THE FIRST AMENDMENT.

The court concluded that if the actions of Western and its employees was governmental action, then the first amendment was necessarily violated.[59] Such a conclusion is improper and is directly contrary to *CBS v. DNC*. As discussed more fully above,[60] the Supreme Court rejected the argument that either the first amendment or the "public interest" standard created a private right of access to the broadcast media. The rationale of *CBS v. DNC* is that the exercise of editorial functions by broadcasters does not violate the first amendment.[61]

---

[59]The court incorrectly stated that defendants conceded "that the censorship was contrary to first amendment standards" (J.A. 169). No such concession was made nor would it have been warranted. Defendants simply agreed that Section 315 had been violated (J.A. 59). Moreover, the court's reliance on *New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) is misplaced. Those cases involved the issue or prior restraints imposed by governmental agencies.

[60]*See* pp. 17-20, *supra*.

[61]In other cases, this same principle has been recognized. In *Mark v. FCC*, 468 F.2d 266 (1st Cir. 1972), the First Circuit held that whether or not broadcaster action is state action, the first amendment does not bar a broadcaster from prohibiting an author promoting astrology from appearing on a television talk show in accordance with an editorial standard established by the National Association of Broadcasters. In *McCarthy v. FCC*, No. 76-915 (D.C. Cir., Oct. 22, 1976), the court held that a minority candidate for the presidency in the 1976 campaign had neither a constitutional nor a statutory right to participate in the televised debates sponsored by the League of Women Voters. In *Writer's Guild v. FCC, supra* the court concluded that the adoption by the networks of the so-called family viewing policy would not be contrary to the first amendment if it had bee . made independent of govern-

(continued)

Without discussing *CBS v. DNC*, the lower court ruled that defendants had violated the first amendment. While the court's reasoning is not clear, it appears to be based upon the conclusion that the existence of Section 315 extinguished the broadcaster's first amendment rights and provided constitutionally protected access rights to plaintiffs.[62] However, an analogous theory was rejected in *CBS v. DNC*. In that case, the Court cautioned that "courts should not freeze this necessarily dynamic process [of Commission regulation] into a constitutional holding."[63]

If the lower court's ruling is that the *CBS v. DNC* holding is not applicable when Congress or the Commission has acted to restrict broadcaster editing it would lead to the anomalous result that the existence of broadcasters' first amendment rights depends upon actions taken by the Congress or the FCC to create a non-constitutional right. Since Congressional and Commission regulation in Section 315 is not immutable, the nature of the broadcasters' first amendment rights would vary depending upon the scope of regulation at any given time.[64]

---

[61](continued)
ment pressure. 423 F. Supp. at 1135-40. And in *Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), the court concluded that substantial first amendment questions would be raised by imposing an obligation of balance and objectivity, again regardless of whether action by the Corporation for Public Broadcasting was deemed state action.

[62]This assumption is discerned from the observation in Note 3 that a different question would be presented if "programming of a different nature" or "the free speech rights of the broadcaster" were involved (J.A. 174).

[63]412 U.S. at 132.

[64]For example, Congress suspended Section 315 as to the presidential campaign in 1960, Pub. L. No. 86-677, 47 Stat. 554, 86th Cong., 2d Sess. (1960), and has under consideration a proposal to repeal Section
(continued)

The lower court's ruling would also undermine the statutory scheme of regulation by creating a private right of action to enforce Section 315 contrary to all precedent. In *Daly v. Columbia Broadcasting System, Inc.*, 309 F.2d 83 (7th Cir. 1962), the court noted this limitation on Section 315:

> No private right of action is created for a candidate for a public office. The basic purpose of the [Communications] Act is regulation in the public interest and not the creation of private rights.

Id. at 85.[65]

The ruling below would further interfere with the regulatory procedures adopted by the Commission to administer Section 315 complaints. Under the present enforcement mechanism, the remedy for a candidate who believes that his "equal opportunities" rights have been violated is to complain to the station during the course of the campaign and then to the Commission, if his demand is not granted. The Commission is prepared to act quickly—often in a matter of hours— on any complaint under this section in order to ensure that material will be broadcast in time to reach the public during the campaign; and the courts will review such Commission action on an expeditied schedule. *See Use of Broadcast Facilities By Candidates for Public Office*, 24 F.C.C.2d 832, 834 (1970). (On the expedited nature of judicial review, *see McCarthy v. FCC, supra.*) This is designed to promote the public interest in obtaining the highest possible level of political information during the campaign when it is still relevant. If

[64](continued)
315 altogether. *See* S. 23, 95th Cong., 1st Sess. (intorduced by Senator Proximire, January 10, 1977). Likewise, the Commission recently reversed its approach to the applicability of Section 315 to candidates' debates. Aspen Institute, 55 F.C.C.2d 697 (1975), *aff'd.* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 97 S.Ct. 247 (1976).

[65]*See* Gordon v. National Broadcasting Co., 287 F. Supp. 452 (S.D.N.Y. 1968). *See also* note 26 *supra.*

the candidate is given the option of waiting until the campaign is over to obtain relief by going into court to seek damages, this regulatory approach would be subverted.

Finally, and perhaps most importantly, the creation of a constitutional right of action for damages would inhibit editorial choice in the coverage of the political process by broadcasters. Imposing first amendment damage liability for a violation of Section 315 would substantially undercut the willingness and ability of broadcasters to present political discussions in areas where there are some questions as to the applicability of Section 315.[66] If the present case is affirmed, broadcasters will have to fear substantial damage liability if they make a "wrong" editorial choice in the coverage of a political campaign and thereby violate Section 315(a). While the violation of Section 315(a) in this case was conceded, the standards and exemptions established in Section 315 raise numerous questions of interpretation and judgment.[67] Broadcasters can almost

---

[66]The Supreme Court has recently noted its agreement with this point, emphasizing that statutes designed to augment the public's exposure to different ideas may have precisely the opposite effect. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that a Florida statute granting a political candidate a right to equal space to reply to criticism by a newspaper violated the first amendment for this very reason:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate, New York Times Co. v. Sullivan, *supra* 376 U.S. at 279, . . . (Footnote omitted).

Id. at 257.

[67]Exemptions from the equal opportunities provision of Section 315 are provided for appearances by candidates on bona fide newscasts, news interviews, certain news documentaries and on-the-spot coverage of news events. 47 U.S.C. §315(a)(1)-(4). *See* note 25 *supra*.

never be totally sure that they are conforming to the requirements of that Section. Although Commission sanctions may be invoked, they may pale in comparison to the potential of monetary damage actions.[68] As a consequence of the decision below, broadcasters might well choose to avoid certain campaign coverage totally, rather than risk the damage liability invited by the court's opinion. This, however, would be totally contrary to the first amendment interest in the widest possible dissemination of ideas and information relating to political campaigns, and to the Congressional purpose in Section 315.

The effect of the decision below, moreover, is not limited to situations involving violations of Section 315(a), and the reasoning would extend at least to any situation where a court had found that the licensee had violated any provision of the Communications Act or Commission regulation or policy. Thus, for example, if a licensee violated Section 312(a) (7) of the Communications Act, requiring broadcasters to supply "reasonable access" to candidates for federal elective office,[69] the Commission's fairness doctrine,[70] the political editorializing rule[71] or the Commission's personal attack rule,[72] the licensee might also be

---

[68]*Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

[69]47 U.S.C. §312(a)(7) (1970).

[70]The fairness doctrine is codified in Section 315 to require broadcasters "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. §315(a). *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[71]The political editorializing rule states, *inter alia*, that when a licensee endorses or opposes a candidate for public office he must notify all other candidates for that office, or the candidate opposed, and must afford reasonable opportunities for their responses. 47 C.F.R. §§73.123(c), 73.300(c), 73.598(c), 73.679(c) (1975). *See* note 24 *supra*.

[72]The personal attack rule requires a licensee to offer a reasonable opportunity to reply to a person or group whose "honesty, character, integrity or like personal qualities" is attacked during a program dealing with a controversial issue of public importance. 47 C.F.R. §§73.123(a), 73.300(a), 73.598(a), 73.679(a) (1975). *See* note 24 *supra*.

found to have violated the first amendment.[73] At the present time, certain of these Commission requirements have been sustained by the courts only because of their inherent generality, which leaves substantial room for the exercise of broadcaster editorial discretion.[74] The imposition of damage liability for violation of these requirements would so severely inhibit the broadcaster's journalistic function that there would be substantial question as to whether any of these Congressional or Commission restrictions on broadcast editing could continue to be imposed consistent with the first amendment.

In short, the questions of statutory and constitutional responsibility are, and must be, totally distinct. The creation of one duty in no way suggests that its breach is at the same time a violation of the other independent source of law. *CBS v. DNC* establishes the basic journalistic nature of the broadcast medium and recognizes the interest of broadcasters in exercising editorial functions. Insofar as private parties claim a right under the first amendment to override broadcaster editorial decisions, broadcasters stand in no different position from newspapers.[75] The fact that Congress in Section 315(a) chose to override broadcasters' editorial decisions in a narrow area does not change the basic editorial nature of the broadcast medium, or provide

---

[73]The court below would possibly award such relief even if the Commission had not determined that a broadcaster had violated a statutory requirement, Commission rule or policy, if the court, in its own interpretation, determined that a violation had occurred.

[74]*See* Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *Cf.* National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 539-40 (2d Cir. 1975).

[75]It is clear that there is no right to override basic editorial judgments in other journalistic media. *See, e.g.*, Avins v. Rutgers, 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

any basis for distinction from other journalistic media. Instead, the *CBS v. DNC* holding that there is no first amendment right of access to the broadcast medium, governs here.

CONCLUSION

The district court's order constitutes an unwarranted and unwise interference with the first amendment rights of broadcast licensees recognized in the Communications Act of 1934, as amended, and protected by the Supreme Court in *CBS v. DNC* and *Red Lion*. The finding of state action on the part of radio station WSTC and its employees was premised upon licensing and regulation by the FCC. However, the Supreme Court has concluded that the mere existence of detailed regulation of a private entity does not make every act, or even every regulated act, of the private firm the action of the state. Unless the regulatory agency has encouraged the practice in question, or, at least, given its affirmative approval to the practice, the fact that a business is subject to regulation is not of decisive importance. Indeed in this case, although the district court confirmed the necessity of a nexus between the challenged activity and the regulatory agency, the opinion overlooks the fact that that necessary link was not present.

While the court intended to limit its decision to political candidates within a community in which the only radio stations are licensed to a single entity, the case has far broader implications. The court's state action finding affects the entire broadcasting industry; regardless of the number of stations licensed to a community or the type of broadcaster editorial decisions under review. The court's decision subverts the statutory scheme of broadcast regulation, undermines the Commission's enforcement procedures and subjects radio and television stations to potentially staggering civil liability.

Even assuming the existence of state action, the exercise of editorial judgment by WSTC and its employees did not

constitute a violation of plaintiffs' alleged first amendment rights. Accordingly, the action of the district court in denying defendants' motion for summary judgment, insofar as the claim for violation of the first amendment is concerned should be reversed.

Respectfully submitted,

Paul C. Jamieson
500 Summer Street
Stamford, Connecticut 06901
(203) 323-1141

Thomas H. Wall
1225 Connecticut Avenue, N.W.
Suite 500
Washignton, D.C. 20036
(202) 659-8200

Attorneys for Western Connecticut Broadcasting Company and Kingsley Gillespie

Of Counsel:

Alan C. Campbell
Richard D. Marks
John R. Feore, Jr.

DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

April 18, 1977

STATUTORY ADDENDUM

Section 3(h), 47 U.S.C. §3(h):

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio braodcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315, 47 U.S.C. §315:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) No station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment to such charge will not violate any limitation specified in paragraph (1), (2), or (3) of section 104(a) of the Campaign Communications Reform Act, whichever paragraph is applicable.

(d) If a State by law and expressly—

(1) has provided that a primary or other election for any office of such State or of a political subdivision thereof is subject to this subsection,

(2) has specified a limitation upon total expenditures for the use of broadcasting stations on behalf of the candidacy of each legally qualified candidate in such election,

(3) has provided in any such law an unequivocal expression of intent to be bound by the provisions of this subsection, and

(4) has stipulated that the amount of such limitation shall not exceed the amount which would be determined for such election under section 104(a)(1)(B) or 104(a)(2)(B) (whichever is applicable) of the Campaign Communications Reform Act had such election been an election for a Federal elective office or nomination thereto;

then no station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate in such election unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment of such charge will not violate such State limitation.

(e) Whoever willfully and knowingly violates the provisions of subsecion (c) or (d) of this section shall be punished by a fine not to exceed $5,000 or imprisonment for a period not to exceed five years, or both. The provisions of sections 501 through 503 of this Act shall not apply to violations of either such subsection.

(f)(1) For the purposes of this section:

(A) The term 'broadcasting station' includes a community antenna television system.

(B) The terms 'licensee' and 'station licensee' when used with respect to a community antenna television system, means the operator of such system.

(C) The term 'Federal elective office' means the office of President of the United States, or of Senator or Representative in, or Resident Commissioner or Delegate to, the Congress of the United States.

(2) For purposes of subsections (c) and (d), the term 'legally qualified candidate' means any person who (A) meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors.

(g) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 326, 47 U.S.C. §326:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing "Brief for Appellants" were served this 18th day of April, 1977 on the below-listed individual by U.S. mail, first class, postage prepaid.

Sydney Vogel, Esquire
25 Third Street
Stamford, Connecticut 06905
Counsel for Appellees

/s/ John R. Feore, Jr.
John R. Feore, Jr.